LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 24 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

WILLIAM ROBERT SMITH
1508 Tower Life Building
San Antonio 5, Texas
Counsel for Respondent

Of Counsel:

SEARS AND BURNS
ROBERT L. BURNS
1811 C & I Life Building
Houston 2, Texas

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

INDEX

	Page
Questions Presented	1
Statutes Involved	3
Counterstatement of the Case	3
Argument	7
I. The Decision of the Court of Appeals is Correct	7
II. The Decision Below Does Not Conflict With Applicable State Law	11
A. Principles Controlling Review of Court of Appeals Decision	11
B. Alleged Conflict With Decision of Texas Supreme Court	13
C. Alleged Conflict With Decisions of Intermediate Courts	15
D. Assuming Conflict — Texas Intermediate Court Decisions Have No Precedential Value And There Is Convincing Evidence The Texas Supreme Court Would Decide Differently	18
E. Alleged Conflict With Federal Decisions	20
III. Additional Grounds Presented To The Court of Appeals	20
A. Assuming An Agreement To Pay For The Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent To Vesting Such Power In Respondent Were Not Performed	21
B. Petitioner's Encasement Was The Performance Of A Legal Duty Assumed As An Incident Of Exercising The Privilege Of Placing Its Pipeline Across A State Highway	23
C. Petitioner's Encasement Was The Performance Of A Legal Duty In Response To The Exercise Of The Police Power Of The State Of Texas	28
Conclusion	30
Certificate of Service	30
Appendix A	31
Statutes	
Appendix B	39
Precedential Value of Opinions Of Texas Courts of Civil Appeals	

AUTHORITIES

Federal Cases

	PAGE
Agoston v. Commonwealth of Pennsylvania, 340 U.S. 844 (1950)	19
Erie R. Co. v. Tomkins, 304 U.S. 64 (1938)	11
Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940)	18, 19
General Box Co. v. United States, 351 U.S. 159 (1956)	12
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945)	19
Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U.S. 258 (1892)	24
Helvering v. Stewart, 317 U.S. 154 (1942)	12
King v. Order of United Travelers of America, 333 U.S. 153 (1948)	18, 19
Langnes v. Green, 282 U.S. 531 (1931)	20
LeTulle v. Scofield, 308 U.S. 415 (1940)	20
Louisiana Power & Light Co. v. City of Thibodeaux, 360 U.S. 25 (1959)	26
MacGregor v. State Mutual Life Ins. Co., 315 U.S. 280 (1942)	12, 13
Panhandle Eastern Pipeline Company v. State Highway Commission, 294 U.S. 613 (1935)	29
Propper v. Clark, 337 U.S. 472 (1949)	12
Richards v. United States, 369 U.S. 1 (1962)	12
Sinclair Pipe Line Co. v. Archer County, 147 F. Supp. 650 (N.D. Tex., 1956) affirmed 245 F. 2d 79 (5th District, 1957)	7, 8, 16, 19, 21, 22
Sioux City Street Ry. Co. v. Sioux City, 138 U.S. 98 (1891)	24
Spiegel's Estate v. Commissioner of Internal Revenue, 335 U.S. 701 (1949)	12, 13
State of California v. Taylor, 353 U.S. 553 (1957)	19
Stoney v. New York Life Ins. Co., 311 U.S. 464 (1940)	12
Supreme Forest Woodmen's Circle v. City of Belton, 100 F. 2d 655 (CCA 5, 1938)	11
United States v. Durham Lumber Co., 363 U.S. 522 (1960)	12, 13
West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940)	18

Texas Cases

Calvary Temple v. Taylor, 288 S.W. 2d 868 (Tex. Civ. App. 1956)	43
Canales v. Laughlin, 214 S.W. 2d 451 (Tex. Sup. 1948)	21
Chicago R. I & G. R.R. Co. v. Tarrant County Water Control & Improvement District, 73 S.W. 2d 55 (Tex. Sup. 1934)	9, 26

PAGE

City of Abilene v. Bailey, 345 S.W. 2d 540 (Tex. Civ. App. 1961, error ref. n.r.e.) 42
City of Abilene v. Downs, 367 S.W. 2d 153 (Tex. Sup. 1963) 42
City of Houston v. Derby, 215 S.W. 2d 690 (Tex. Civ. App. 1948), error ref.) 22
Clark v. Greer, 232 S.W. 2d 876 (Tex. Civ. App. 1950) 10
Cofield v. Britton, 109 S.W. 493 (Tex. Civ. App. 1908, error dism.) 11
Dockum v. Mercury Ins. Co., 135 S.W. 2d 700 (Tex. Sup. 1940) 15
Eubanks v. State, 203 S.W. 2d 339 (Tex. Civ. App. 1947, error ref.) 14
Ex Parte Ernest, 136 S.W. 2d 595 (Tex. Crim. App. 1940) 11
Fleming v. Houston Lighting & Power Co., 138 S.W. 2d 520 (Tex. Sup. 1940) 23
General American Life Ins. Co. v. Rios, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521) 43
Gillette v. Achterberg, 325 S.W. 2d 384 (Tex. Sup. 1959) 41
Gulf C. & S.F. Ry. Co. v. Milam County, 38 S.W. 747 (Tex. Sup. 1897) 10, 26
Houston & T.C. Ry. Co. v. City of Houston, 41 S.W. 2d 352 (Tex. Civ. App. 1931) 10
Humble Pipe Line Co. v. State, 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.) 27
Joslin v. State, 146 S.W. 2d 208 (Tex. Civ. App. 1940, error ref.) 14
Lone Star Gas Co. v. State, 153 S.W. 2d 681 (Tex. Sup. 1941) 27
Magnolia Pipeline Co. v. City of Tyler, 348 S.W. 2d 537 (Tex. Civ. App. 1961, error ref.) 13, 14, 15
Malone v. United States Fidelity & Guaranty Co., 9 S.W. 2d 461 (Tex. Civ. App. 1928) 43
Mayor of City of Houston v. Houston City St. Ry. Co., 19 S.W. 127 (Tex. Sup. 1892) 23
McLennan County v. Sinclair Pipeline Company, 323 S.W. 2d 471 (Tex. Civ. App. 1959, error ref. n.r.e.) 15, 16, 17, 19
Miller v. Branch, 233 S.W. 1032 (Tex. Civ. App. 1921) 44
Missouri K & T R. Co. v. Rockwall County Levee Improvement District, 297 S.W. 206 (Tex. Sup. 1927) 26
Sacred Gardens of Memory, Inc. v. State, 334 S.W. 2d 220 (Tex. Civ. App. 1960) 22
Sinclair Pipe Line Co. v. State, 322 S.W. 2d 58 (Tex. Civ. App. 1959) 15, 16, 19
Southwestern Telephone & Telegraph Co. v. City of Dallas, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.) 23

PAGE

State v. City of Austin, 331 S.W. 2d 737 (Tex. Sup. 1960) 8, 9, 14, 19, 20, 23
State v. J. M. Huber Corporation, 199 S.W. 2d 501 (Tex. Sup. 1947) 14
State v. Larimore, 295 S.W. 2d 654 (Tex. Sup. 1956) 40
Storrie v. Houston City St. Ry. Co., 46 S.W. 796 (Tex. Sup. 1893) 23
Thompson v. Gibbs, 240 S.W. 2d 287 (Tex. Sup. 1951) 40
Traders' Compress Co. v. State, 77 S.W. 2d 245 (Tex. Civ. App. 1934) 21
Valmont Plantations v. State, 355 S.W. 2d 502 (Tex. Sup. 1962) 14

Constitution, Statutes and Rules

Texas Constitution
Article I, Section 17 23
Article VIII, Section 7a 8

Vernon's Annotated Civil Statutes
Article 1436 ..... 3, 24, 25, 32
Article 1436a 24
Article 1436b 3, 24, 25, 33
Article 1497 ..... 3, 24, 25, 32
Article 1728 14
Article 6020 24
Article 6021 ..... 3, 25, 35
Article 6327 ..... 3, 24, 25, 35
Article 6663 ..... 3, 28, 36
Article 6665 ..... 3, 28, 37
Article 6666 ..... 3, 28, 37
Article 6667 ..... 3, 10, 28, 37
Article 6673 ..... 8, 11, 28
Article 6674a 3, 8, 38
Article 6674c-1 10
Article 6674n 3, 7, 8, 11, 21
Article 6674q-4 ..... 3, 7, 8, 11, 28
Article 6674w-4 8

Texas Rules of Civil Procedure
Rule 467 40
Rule 483 40

Miscellaneous

Calvert, *The Application for Writ of Error*, 3 Franki, Texas Rules of Civil Procedure 404, 410 (1955) 41
Simpson and Wall, *Problem of Precedent Affecting Courts of Civil Appeals' Opinio* . 4 S.W.L.J. 398 (1950) 41
Simpson, *Notations on Application for Writ of Error*, 12 Texas Bar Journal 547 (1949) 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause January 9, 1963.

QUESTIONS PRESENTED

1. Whether, under the statutes of Texas granting exclusive control of, and imposing the exclusive duty to improve

and maintain, State Highways on the Texas Highway Department, and prohibiting expenditure of funds of Texas counties for State Highways for any purpose other than acquisition of right-of-way, a Texas county authorizing a utility, which has refused to comply with the request of the Texas Highway Department to encase its gas pipeline in right-of-way acquired to widen an existing State Highway, to make such encasement at the expense of the county, has contracted to acquire right-of-way, or to construct and improve the highway.

2. Whether an order of a Texas county that it will pay "according to law all legal claims affixed against it, for the casing . . . of all pipelines in existing and proposed . . . highway rights-of-way, when not otherwise compensated" is an offer to contract to pay a utility the expense of encasing its gas pipeline in right-of-way acquired to widen an existing State Highway.

3. Whether, under the statutes of Texas, assuming that the agreement of a Texas county to pay a utility the cost of encasing its gas pipeline in right-of-way acquired to widen an existing State Highway is one to acquire right-of-way, such county has the power to make such contract in the absence of evidence of (a) a determination by the State Highway Commission to improve and widen such State Highway, (b) a contract between the county and the State Highway Commission obligating the county to acquire right-of-way to widen such highway, (c) a request from the State Highway Commission to the county to acquire right-of-way from such utility, and (d) the State Highway Commission performing its duty of furnishing to the county plats or field notes of the easement of such utility.

4. Whether, under the Constitution and statutes of Texas, a utility which has exercised the privilege (granted by statute and permit of the Texas Highway Department) of

placing its gas pipeline across a State Highway, has a legal duty to comply with the request of the State of Texas, acting through the Texas Highway Department, to encase its pipeline in right-of-way acquired to widen such highway.

5. Whether a request by the Texas Highway Department to a utility which has exercised the privilege (granted by statute and permit of the Texas Highway Department) to place its gas pipeline across a State Highway, to encase its pipeline in right-of-way acquired to widen such highway, is a valid exercise of the police power of the State of Texas.

STATUTES INVOLVED

The pertinent statutes are Vernon's Annotated Civil Statutes, Articles 6673, 6674n and 6674q-4, set out in Appendix B to the Petition, and Articles 1436, 1497, 1436b, 6021, 6320, 6327, 6663, 6665, 6666, 6667, 6674a, set out in Appendix A, infra, pp. 32-39.

COUNTERSTATEMENT OF THE CASE

A counterstatement is necessary to correct inaccuracies in Petitioner's statement.

To prevent definite hazards to vehicular and other traffic, the highway and the pipeline, since 1949, by maintenance manuals and administrative order, the Texas Highway Department (Department) has required pipelines carrying gas across a State Highway to be encased for the full width of the right-of-way and vented at each end (R. 28-35). The packed nature of the soil under, and the pressure and weight of vehicular traffic on, a roadway causes unusual stresses on an unencased gas pipeline which may result in damage to the pipeline, cave-ins of the roadway, escaping gas subject to explosion and other hazards, and extensive corrosion by electrolysis.

Encasement provides protection to the gas pipeline from the compact soil, weight and pressure of vehicular traffic, and electrolysis; prevents leaks, escaping gas and other hazards; provides a passage for the escape of the gas to the vents at the right-of-way line; and eliminates traffic hazards resulting from escaping gas, and cave-ins in the roadway by permitting repair of the pipeline without obstructing traffic by cutting the pavement (R. 28, 29, 27, 115, 116).

In 1950, the Department issued written permits authorizing Petitioner to install a gas pipeline across U. S. Highway 69 and F.M. (Farm-to-Market) Highway 418 in Hardin County, on the condition, among others, that the pipe be placed through a hole bored beneath the highway in an iron casing extending from right-of-way line to right-of-way line, and sealed and vented at the ends (R. 186, 188, 189). Petitioner constructed its line, encased and vented, across each highway (R. 14, 19) and, in 1951, acquired pipeline easements from the owners of the lands abutting the crossings (R. 233-235).

Thereafter, Respondent undertook to acquire right-of-way to widen each highway, but Petitioner inaccurately states that the Department determined to widen said highways. There is no evidence of an order of the State Highway Commission directing the widening of either highway.

In 1955, Respondent contracted with the Department to acquire right-of-way for, fence, and remove all obstructions on F.M. Highway 418 (R. 204, 205). There is no evidence of Respondent contracting to acquire right-of-way for U.S. Highway 69. Except as authorized by contract, the Department could not and did not require Respondent to acquire any right-of-way.

The Department furnished Respondent plats, field notes and right-of-way deeds (naming the grantors) for each par-

cel of land the Department requested Respondent to acquire (R. 66, 189, 196), but did not furnish Respondent a plat, field notes or a right-of-way deed of Petitioner's easements abutting either highway and did not request Respondent to purchase or condemn Petitioner's easements (R. 66). Pursuant to the request (plat, field notes, and deeds) of the Department, Respondent acquired from the various owners all right-of-way necessary for the widenings, including the parcels of land owned by the grantors of Petitioner's easements (R. 66). As Petitioner admits, however, "Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein" (Petition p. 4). Petitioner is still using its easements, its pipelines were not removed, and neither Respondent nor the State of Texas acquired any interest from Petitioner.

While Respondent was acquiring right-of-way for widening of the highways, the Department, on several occasions, requested Petitioner to encase and vent its pipelines in the right-of-way acquired to widen the existing highways (not new highways) in accordance with the permit under which they were installed (R. 67, 194, 214). Petitioner repeatedly refused to comply with the request unless assured of reimbursement for its actual cost (R. 15, 20, 197, 219).

The sole basis of Petitioner's statement that the Department considered an uncased pipeline an obstruction is the testimony of local engineers that, from an engineering point of view, anything in the way of construction or maintenance was an obstruction, and that such conclusion was simply an engineer's attempt to interpret Respondent's contract (R. 86, 104, 115). Similarly, there is no basis for Petitioner's statement that Department officials considered that Respondent had the responsibility to compensate for casing its pipeline. Local engineers attempted to so inter-

pret Respondent's contract, but admitted that they would not state Respondent owed Petitioner reimbursement, but only that reimbursement would not come from the State (R. 83-87, 101-105, 115, 125-127).

The "officials" did not refer the matter of compensation to Respondent. A local engineer wrote Petitioner that, as to the question of reimbursement, the State could not help, as "the clearing of right-of-way is a matter handled by the County" (R. 199), and local engineers refused to testify that they had even referred Petitioner to Respondent. (R. 117-118, 126-127). After Petitioner's repeated refusals, Respondent's County Judge entreated Petitioner to comply with the Department's request. (R. 200, 227). Petitioner replied that it realized that Respondent was "not responsible for the specification that the highway in question be cased", but that it would not commence casing until informed it would be reimbursed (R. 202-204). Respondent then passed an order stating that Petitioner "is authorized to extend the casing of their pipelines across U. S. Highway 69 at county expense" (R. 149).

The County Judge advised Petitioner that it was the County's contention that payment for extended casing on F.M. Highway 418 would be illegal and, following Petitioner's reply arguing that Respondent had authority to pay for the casing (R. 226-227), Respondent passed an order that it would pay "according to law all legal claims affixed against it, for the casing" of pipelines across State Highways (R. 228).

Following each order, Petitioner encased its pipelines as requested by the Department (R. 205-207, 227-230). Respondent refused to reimburse Petitioner and Petitioner filed this suit. Motions for Summary Judgment were filed by both parties, and the District Court, filing findings of fact and conclusions of law (R. 64-71), granted the motion

of Petitioner and denied Respondent's. The Court of Appeals reversed the District Court judgment and remanded the cause, with directions that judgment be entered for Respondent.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS CORRECT

After extensive review of Texas statutes and decisions delineating the respective duties and powers of the Texas Highway Department and counties as to State highways, and defining the limited power of Texas counties, the Court of Appeals concluded that Respondent did not have power to pay Petitioner to case its line because (1) the Texas Highway Department has exclusive control of and power and duty to construct and maintain State highways, (2) no funds of a Texas county can be expended for the construction or improvement of a State highway, (3) county funds may be expended only for the purpose of acquiring right-of-way, and (4) the extension of casing on a pipeline is not incidental to acquisition of right-of-way but to construction.

These holdings are not, as Petitioner asserts, based solely on a construction of Vernon's Ann. Civ. Stats. Articles 6674n and 6674q-4, and *Sinclair Pipe Line Co.* v. *Archer County*, 147 F. Supp. 650 (N.D. Tex., 1956), affirmed 245 F. 2d 79 (5th Circuit, 1957). As evidenced by the opinion, the holding rests upon a review of Texas cases defining the limited power of a county; review of the basic legislation creating the Texas Highway Department and defining its powers; review of all statutes (not merely those cited by Petitioner) relating to State highways; analysis of Texas decisions construing such basic legislation and supple-

mentary statutes; the *Archer County* case and "the force and effect of the Texas statutes and decisions cited in and made the basis" of such case; and other authorities cited in Respondent's brief below.

Under the express language of Vernon's Ann. Civ. Stats., Articles 6673, 6674n and 6674q-4, all *improvement and construction* of State Highways must be paid out of the State Highway fund, and the counties of Texas are *prohibited from paying any money except for the acquisition of right-of-way.* Thus, the question of Respondent's power may be determined by defining acquisition of right-of-way and improvement or construction of a State Highway. Vernon's Ann. Civ. Stats., Article 6674a, prescribes the answer that

> "The term 'improvement' shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto."

Although no State decision construing the statutes involved or deciding the precise issue in question was cited to the court below, in addition to *Archer County* and the cases cited therein, in determining that the agreement to pay Petitioner to case its pipeline was not incidental to acquisition of right-of-way, but to construction and improvement of the highway, the court considered the decision of the highest court of the State in *State* v. *City of Austin*, 331 S. W. 2d 737 (Tex. Sup. 1960). The State contended that Vernon's Ann. Civ. Stats., Article 6674-w-4, under which various utilities sought reimbursement for relocation of facilities necessitated by improvement of an interstate highway, violated Tex. Const., Article VIII, Section 7a,[1] in that

---

[1] This provision prescribes that certain funds "shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining and policing "public roadways.

the cost of relocation of the utility was not part of the cost of "constructing" a highway.

With the point squarely presented "that utility relocation expense is not part of the cost of highway construction", the court reviewed decisions from other states denying such contention, and concluded:

> "It seems to us that the latter conclusion is sound in principle and supported by the better reasoning. Article VIII, Section 7-a, does not define or restrict the meaning of 'constructing' in any way. The term obviously does not embrace merely the clearing and grading of the roadbed and the pouring of concrete, but includes 'everything appropriately connected with, and necessarily incidental to, the complete accomplishment' of the general purpose for which the fund exists."
>
> • • •
>
> "The relocation of such facilities is made necessary by and is an integral part of the highway improvement program. If the Legislature determines, as it has in this instance, that the non-betterment cost thereof should be paid by the state, it is our opinion that the same is properly attributable to highway construction within the meaning of the Constitution."

Understandably, Petitioner does not cite *City of Austin* or any other decision of the Texas Supreme Court.

Petitioner did not seek to recover the market value of its easements, but only sought to recover the cost of encasement. In determining that an agreement to pay the expenses of casing a pipeline is incidental to construction and improvement, and not acquisition of right-of-way, the court below considered the well settled law of Texas that the measure of damages for a taking is the market value of the property taken and not cost of adjustment. *Chicago R.I. & G. R.R. Co.* v. *Tarrant County Water Control & Improve-*

ment District, 73 S.W. 2d 55 (Tex. Sup. 1934); *Gulf C. & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897); *Houston & T.C. Ry. Co.* v. *City of Houston*, 41 S.W. 2d 352 (Tex. Civ. App. 1931). Respondent made no effort to purchase or condemn Petitioner's easement.

Petitioner infers that Respondent is liable, under its agreement with the Department, to "remove all obstructions". Petitioner's pipeline was not even lowered, much less removed — merely encased. Moreover, inasmuch as the power of Respondent is limited to acquiring right-of-way, it is powerless to contract to remove any obstruction except those removed as an incident of acquiring right-of-way. Respondent acquired no right-of-way from Petitioner.

Petitioner urges here, as it did for the first time in the Petition for Rehearing below, that Vernon's Ann. Civ. Stat., Article 6674c-1, authorizes a Texas county to make voluntary contributions to the Department for the development of highways in such county. The statute does not authorize a contribution for the development of *State Highways*, but for "public roads of such county". Under Vernon's Ann. Civ. Stats., Chap. 2, Title 116, Texas counties still establish and maintain county roads which are not a part of the State Highway System. Vernon's Ann. Civ. Stat. 6667 authorizes the Department to render assistance to counties with reference to their public roads, and Article 6674-c-1, was enacted to provide a means for counties to contribute funds to the State Highway Department to be used in the development of *county roads* — not State highways.

Clark v. *Greer*, 232 S.W. 2d 876 (Tex. Civ. App. 1950), approves a conveyance by a *city* to the Highway Commission, but, contrary to Petitioner's claim, expressly notes that "The question of the city's right of eminent domain to condemn a right-of-way for the purposes [State high-

way] here involved is not before us and we do not pass upon the same." *Clark* unnecessarily and erroneously cites the statute because its application is limited to "any county or political subdivision of any county in this State". A Texas city is a political subdivision of the State — not of a county. *Supreme Forest Woodmen's Circle* v. *City of Belton*, 100 F. 2d 655 (CCA 5, 1938); *Ex Parte Ernest*, 136 S.W. 2d 595 (Tex. Crim. App. 1940); *Cofield* v. *Britton*, 109 S.W. 493 (Tex. Civ. App. 1908, error dism.).

Vernon's Ann. Civ. Stats., Articles 6673, 6674n, and 6674q-4, are consistent in the limitation that no county funds may be expended on a State highway except for acquisition of right-of-way. Being consistent, there is no question of implied repeal.

Under the statutes and decisions before the court below, the convincing evidence was that the Texas Supreme Court would hold in accordance with the judgment under attack.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE STATE LAW

A. Principles Controlling Review of Court of Appeals Decision

The petition fails to show that the Court of Appeals "decided an important state . . . question in a way in conflict with the applicable state . . . law . . ." Rule 19, Supreme Court Rules.

Under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in deciding a state question, Federal courts must follow the "law of the state" as declared by its Legislature, or by its highest court, or in some instances by an intermediate court. Petitioner cites no statute or decision of a

Texas court which conflicts with the decision of the court below. To conflict with a decision of a court of appeals, the state decision must be upon "the precise issue of state law involved", *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); a "pronouncement which directly controls [the] question," *General Box Co.* v. *United States*, 351 U.S. 159 (1956); a "case on the precise statute" before the Court of Appeals, *Propper* v. *Clark*, 337 U.S. 472 (1949); a case "construing the relevant" state law, *MacGregor* v. *State Mutual Life Ass. Co.*, 315 U.S. 280 (1942); or a case determining "the precise question in issue", *Stoney* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

In the absence of an authoritative state decision on the *precise issue in question* or construing the *precise statute*, the Supreme Court will "ordinarily accept the determinations of courts of appeals on questions of State law," *Richards* v. *United States*, 369 U.S. 1 (1962), and will not disturb their decisions on State law unless the "conclusions are shown to be unreasonable" or "clearly erroneous or unreasonable," *United States* v. *Durham Lumber Co.*, *supra*; there is "a definite conviction of error," *Helvering* v. *Stewart*, 317 U.S. 154 (1942); or it can be said with "certainty that the Court of Appeals holdings was wrong." *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701 (1949). The decision will be upheld if "reasonable arguments can be based on [State] cases to support a determination" of the question "either for or against the Petitioner," *Spiegel's Estate*, *supra*.

Moreover, in the absence of a state court decision deciding "the precise issue of state law" or "construing the relevant" state statute, the Supreme Court will leave undisturbed the interpretation placed upon purely local law by a court composed of three judges (including a judge of long experience in the jurisprudence of the state) who are constantly re-

quired to pass upon law questions of the state, *Spiegel's Estate* v. *Commissioner of Internal Revenue, supra; MacGregor* v. *State Mutual Life Ass. Co., supra;* and *United States* v. *Durham Lumber Co., supra.* The challenged decision was rendered by three judges who are constantly required to pass upon the law of Texas and was written by Judge Joseph C. Hutcheson, a judge with many years experience in applying Texas law on the Court of Appeals and District Court and in private practice. In attacking the judgment of these lawyers skilled in the law of Texas, Petitioner has not shown that it conflicts with a statute or authoritative decision of a Texas court or presented any evidence, much less convincing evidence, that the courts of Texas would have decided the issue differently.

B. Alleged Conflict With Decision of Texas Supreme Court

In citing *Magnolia Pipeline Co.* v. *City of Tyler,* 348 S.W. 2d 537 (Tex. Civ. App. 1961, error ref.), Petitioner errs in characterizing it as a decision of an intermediate court and asserting that it conflicts with the decision below. This case, in effect, is a decision of the highest court of Texas,[2] and does not conflict with the decision below.

This case does not hold "that counties and cities in Texas may be required to compensate for adjustments of pipelines crossed by new streets or highways". The court held that a *city* which uncovered pipelines while cutting and grading one street and "attempting to pave very near" a pipeline on another street, was liable for the *lowering* and encasing of such pipelines because the necessity for such adjustments *resulted from the street improvement.* The

[2] The Supreme Court adopted the opinion of the Court of Civil Appeals by unqualifiedly refusing the application for writ of error. See Appendix B, pp. .....

precise issue decided was the liability of a *city*, not a county, resulting from improvement of a *city* street, not acquisition of right-of-way for a State Highway. The ultimate holding of the court is simply that Magnolia was entitled to compensation. The court did not determine whether the compensation was for a taking or damaging of property. No taking of an easement was involved, however, because the city street had been placed over the easement several years prior to the paving project prompting the suit.

Summarizing, this case decided issues relating to a *city*, not a county; a *city street*, not a State Highway; *improvement of a city street*, not acquisition of right-of-way for a State Highway. Stated differently, liability was based upon the results of improving streets, the statutes governing counties and highways were not construed, and the precise issue here was not decided. The precise issue was more nearly involved in *State* v. *City of Austin, supra*, than in *Magnolia Pipeline Co.*, and the highest court held that relocation expense was *a part of construction.*

Under the law as announced by the highest court of Texas, a decision which does not construe or pass upon the validity of a statute, or in which a disputed issue is not raised, or is not founded upon substantially the same state of facts, is not stare decisis or binding upon courts later considering the statute or precise issue. *Valmont Plantations* v. *State*, 355 S.W. 2d 502 (Tex. Sup. 1962); *State* v. *J. M. Huber Corporation*, 199 S.W. 2d 501 (Tex. Sup. 1947); *Eubanks* v. *State*, 203 S.W. 2d 339 (Tex. Civ. App. 1947, error ref.); *Joslin* v. *State*, 146 S.W. 2d 208 (Tex. Civ. App. 1940, error ref.). Not having construed the statutes involved or decided the precise issue as to the power of a county, *Magnolia Pipeline Co.* does not conflict.

Vernon's Ann. Civ. Stat., Article 1728, vests jurisdiction in the Texas Supreme Court when "one of the Courts of

Civil Appeals holds differently from a prior decision of another Court of Civil Appeals . . . upon any question of law material to a decision of the case". If the opinion below had been a Texas intermediate court decision, the Texas Supreme Court would not have had jurisdiction to review on the ground that it conflicted with *Magnolia Pipeline Co.* because decisions are not in conflict unless they are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other". *Dockum* v. *Mercury Ins. Co.*, 135 S.W. 2d 700 (Tex. Sup. 1940). Petitioner asks this Court to find a conflict which the Texas Supreme Court could not find.

C. Alleged Conflict With Decisions of Intermediate Courts

Erroneously urging that, under the holdings of this Court, the Court of Appeals "was obligated", blindly, "to follow" decisions of intermediate courts, Petitioner asserts that *McLennan County* v. *Sinclair Pipeline Company*, 323 S.W. 2d 471 (Tex. Civ. App. 1959, error ref. n.r.e.), and *Sinclair Pipeline Company* v. *State*, 322 S.W. 2d 58 (Tex. Civ. App. 1959), conflict with the decision below. Assuming, for the moment, that this is the guiding principle, Petitioner fails to show conflict.[3]

Neither decision construes the statutes considered by the Court below or decides the precise question in issue. The question of whether an agreement to pay for casing a gas pipeline is an incident of *construction* or acquisition of right-of-way was neither raised nor decided. Each involved the *lowering* of a pipeline, and, while Respondent cannot concede that lowering a pipeline is a part of acquisition of right-of-way, it does *not* smack of construction as much as casing a pipeline, which involves no lowering or removal.

---

[3] See discussion infra, pp. 18-20.

Sinclair Pipeline Company is a condemnation suit in which a county sought to acquire, and obtained, a judgment condemning "an easement of right of way". During negotiations for purchase of the easement, the company *lowered* and encased its pipeline upon agreement for reimbursement. The Court of Civil Appeals reversed the trial court judgment awarding no damages upon the holding that since, *by the condemnation suit,* the company's property had been taken, the measure of damages was the cost of adjustment. By seeking condemnation, the county could not deny its power to condemn, and Sinclair did not question, but *conceded* that right. Under this record, no question as to the power of the county under the applicable statutes could have been presented.

Only *lowering,* not casing, a pipeline is involved in *McLennan County.* The case relies heavily upon *Sinclair Pipeline Company* without recognizing the fundamental differences in the suit presented and a condemnation suit. Contrary to Petitioner's assertion that the Court "refused to follow the Federal courts' holding in the *Archer County,* case", the Court misconstrued *Archer County* and followed its misconstruction. The Court states that "the Archer County case holds . . . that Sinclair's easement was in that case taken" and that "the Archer County case is not contrary to the foregoing but actually supports the result herein reached". *Archer County* held that Sinclair's easement was *not* taken, and if the applicable statutes had been presented in *McLennan County, Archer County* would not support the Court's holding. No issue as to the power of a county to pay for lowering a pipeline on a State Highway being presented, the court disposed of the case on the *assumption* that the county had such power.

Neither decision is authoritative in Texas. The Texas Supreme Court was not requested to review *Sinclair,* and,

contrary to Petitioner's claim that the Court "approved the result", refused to approve *McLennan County*.[4] Again, the fact that the Texas Supreme Court would not have had jurisdiction to review the decision of the Court below if it had been an opinion of a Texas intermediate court on the ground of conflicting with these decisions is conclusive proof of lack of conflict.

The opinions of the Attorney General of Texas are equally irrelevant. The opinions proceed on the assumption that requiring adjustment of pipelines involves acquisition of right-of-way and do not discuss or rule on the extent of a county's power under the statutes construed by the Court below. None of the opinions consider or discuss the relative duties of the Highway Department and counties and the difference between construction and acquisition of right-of-way. None recognize the distinction between a taking and damaging. Each demonstrates, without recognizing, the difference between acquisition of right-of-way and paying for adjustment of a pipeline, by noting that if a price cannot be agreed upon, the county would have to "condemn the easement" — not condemn the right to lower or case the pipeline. As evidenced by WW-1090, the opinions recognize no distinction between a county road and a state highway. WW-125 points out that the cost of lowering and encasement would not be a separate issue, but would be considered in the general issue of the value of the easement taken. Unless an easement is *taken* there is no acquisition of right-of-way.

---

[4] See Appendix B, pp. 40-42.

D. Assuming Conflict — Texas Intermediate Court Decisions Have No Precedential Value And There Is Convincing Evidence The Texas Supreme Court Would Decide Differently

Petitioner erroneously argues that, under the rules announced by this Court, the court below was compelled to follow the cited decisions of the Courts of Civil Appeals. The quest is for the "law of the State" which is determined "from all the available data," including decisions of intermediate courts, when authoritative, and in some instances lower courts. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940); *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940). Such decisions may be disregarded, however, where there is "persuasive data that the highest court of the state would decide otherwise." In states where decisions of an intermediate or lower court may be ignored by other courts of similar jurisdiction, the Federal court is not bound by such a decision. *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153 (1948).

The precedential value of opinions of Courts of Civil Appeals is determined by the notation of the Texas Supreme Court in refusing to review them. When the notation is an unqualified "Refused," the Supreme Court adopts the opinion of the Court of Civil Appeals.[5] When the refusal to review is stamped "Refused, No Reversible Error," it means, and only means, that the application for writ of error presented no error which required reversal, (through omission or otherwise) and does not mean that the Supreme Court approves any holding stated in the opinion of the Court of Civil Appeals or approves the judgment entered. Such cases "are but persuasive only, with little precedential value."[6]

---

[5] See Appendix B. pp. 40, 41.
[6] See Appendix B. pp. 40-42.

Entry of such notation by the Texas Supreme Court, like denial of a petition for writ of certiorari by this Court, "imports no expression of opinion upon the merits of the case". *Agoston* v. *Commonwealth of Pennsylvania*, 340 U.S. 844 (1950).

There are eleven Courts of Civil Appeals in Texas, and it has been held uniformly that *the doctrine of stare decisis is not applicable to a decision of such courts*, and one court is not bound to follow the holding of another unless it is satisfied with the reasoning of the decision.[7] *A Court of Appeals can have no greater obligation.*

Inasmuch as a Court of Appeals "adjudicating a State-created right solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State", *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 108 (1945), the Court below was no more bound by *McLennan County* and *Sinclair Pipeline Company* than other Texas Courts of Civil Appeals. The status of the decision of the Court of Civil Appeals is more comparable to the common pleas decision considered in *King* v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948), and is not the same as opinions of intermediate and lower courts considered in *State of California* v. *Taylor*, 353 U.S. 553 (1957), *Fidelity Union Trust Company* v. *Field*, 311 U.S. 169 (1940), and similar cases. Like a decision of the Court of Common Pleas of South Carolina, an opinion of a Court of Civil Appeals is not taken in the State as "authoritative expositions of that State's 'law' ", does not exact conformity from the same court or other Courts of Civil Appeals or lesser courts, and may be ignored by other Courts of Civil Appeals. As *King* concludes, "it would be incongruous indeed to hold the Federal Court bound by a decision which would not be binding on any State court".

---

[7] See Appendix B. pp. 43, 44.

Irrespective of the precedential value of the cases cited by Petitioner, there is convincing evidence that the highest court of Texas would decide differently. This evidence, which was before the court below, consists of the refusal of the Texas Supreme Court to approve the decisions cited by Petitioner, the holding in *Archer County*, the Texas decisions cited in *Archer*, the Texas statutes (none of which were reviewed by such decisions), and the decision of the Texas Supreme Court in *State* v. *City of Austin*, *supra*, that the cost of relocation of a utility is an expense of construction.

E. Alleged Conflict With Federal Decisions

The Federal decisions cited by Petitioner do not conflict with the holding below. None decide the question of whether adjustment of a pipeline is an incident of construction or acquisition of right-of-way as those terms are used in Texas statutes, or construe any of the Texas statutes or adjudicate the power of a Texas county. While these cases characterize certain acts as "takings", they actually refer to a damaging. Under Texas law, Petitioner's easements have not been taken, as Petitioner is still using them, and any result from the construction of the highway is a damaging — not acquisition of right-of-way.

III.

ADDITIONAL GROUNDS PRESENTED TO THE COURT OF APPEALS

In addition to the ground stated in the opinion below, Respondent presented other grounds which support the judgment, and may urge those grounds to this Court. *Le-Tulle* v. *Scofield*, 308 U.S. 415 (1940); *Langnes* v. *Green*, 282 U.S. 531 (1931).

A. Assuming An Agreement To Pay For The Cost of Encasement is Acquisition of Right-of-Way, Conditions Precedent to Vesting Such Power In Respondent Were Not Performed

A Texas county has only such powers as are expressly granted by statute, and must exercise its powers in the manner prescribed by statute. When a statute imposes a condition precedent to the exercise of a power, *the condition must be performed if the power is to be exercised. Canales* v. *Laughlin*, 214 S.W. 2d 451 (Tex. Sup. 1948). To vest power in a Texas county to acquire right-of-way for a State highway, the State Highway Commission must have determined the necessity for acquiring the right-of-way, contracted with the County to acquire the right-of-way, requested the county to acquire particular parcels, and furnished the county plats or field notes and right-of-way deeds of the parcels to be acquired.

In two places, Vernon's Ann. Civ. Stats., Article 6674n, authorizes a county to acquire right-of-way *only* when "in the judgment of the State Highway Commission" such acquisition is necessary. There is no evidence of action of the State Highway Commission determining that acquisition of right-of-way from Petitioner was necessary. The statute is permissive and does not impose any duty on a county to acquire right-of-way until its has contracted to do so. *Traders' Compress Co.* v. *State*, 77 S.W. 2d 245 (Tex. Civ. App. 1934); *Sinclair Pipeline Company* v. *Archer County*, 245 F. 2d 79 (CCA 5, 1957). There is evidence of a contract between the Commission and the County as to Highway 69, but none as to F.M. Highway 418.

The statute charges the Commission with the duty of furnishing the county "plats or field notes of such right-of-way or land," "*after* which the Commissioners' Court

may, and is hereby authorized to purchase or condemn the same . . . in accordance with such field notes". In the court below, Petitioner admitted the undisputed facts that the Commission made no request to Respondent to acquire right-of-way from Petitioner and did not furnish plats or field notes of its easements. The Commission furnished right-of-way deeds (with the name of the grantor) on all parcels of land desired, but furnished none as to Petitioner's easements. The furnishing of information necessary to negotiate and condemn is a condition precedent to vesting power to acquire right-of-way in Respondent. *Sacred Gardens of Memory, Inc.* v. *State*, 334 S.W. 2d 220 (Tex. Civ. App. 1960); *Sinclair Pipeline Company* v. *Archer County, supra.*

It is only "after" the county has been furnished this information that it is "authorized to purchase or condemn" right-of-way. The mandate to furnish field notes "for purchase or condemnation" necessarily includes a duty to furnish the name of the grantor. The statute contemplates a purchase, and condemnation if purchase is impossible. The statute requires the procedure of the general condemnation statutes (which require negotiation with the owner) to be followed. Proof of negotiation is a condition precedent to vesting jurisdiction of a condemnation case in the courts. *City of Houston* v. *Derby*, 215 S.W. 2d 690 (Tex. Civ. App. 1948, error ref.). Respondent could not attempt to comply with the statutory condemnation procedure until the Commission had furnished it field notes and the name of the grantor.

The State Highway Commission not having requested acquisition of Petitioner's easements or furnish data necessary for acquisition, the conditions precedent prescribed by the statute were not performed and the power to acquire right-of-way from Petitioner did not vest in Respondent.

B. Petitioner's Encasement Was The Performance Of A Legal Duty Assumed As An Incident Of Exercising The Privilege Of Placing Its Pipeline Across A State Highway.

The Legislature of Texas has plenary power to control and regulate its highways, may delegate this power to political subdivisions or other arms of the State, and may grant utilities the privilege of crossing highways. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). In delegating the power to control highways and granting the privilege to utilities to cross a highway, *the power of the Legislature is subject to an important constitutional limitation.* Tex. Const., Article I, Section 17, provides in pertinent part:

> ". . . no irrevocable or *uncontrollable* grant of special privileges or immunities shall be made, but *all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof.*"

By force of this section, legislative delegation of the power to control highways imposes the attendant duty of exercising control over privileges and franchises to use highways, and whether expressed in the statute or not, legislative grant to a utility of the privilege of crossing a highway is subject to the continued control of the State or its arm to impose additional burdens upon the exercise of the privilege. *Storrie* v. *Houston City St. Ry. Co.*, 46 S.W. 796 (Tex. Sup. 1893); *Mayor of City of Houston* v. *Houston City St. Ry. Co.*, 19 S.W. 127 (Tex. Sup. 1892); *Fleming* v. *Houston Lighting & Power Co.*, 138 S.W. 2d 520 (Tex. Sup. 1940); *Southwestern Telephone & Telegraph Co.* v. *City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, error ref.). Under constitutional and statutory provisions reserving continued control over privileges and franchises, the State reserves the right to

impose additional burdens upon the exercise of a privilege, and acceptance of a privilege is made upon the condition that additional burdens imposed by the State will be performed. *Hamilton Gaslight & Coke Co.* v. *City of Hamilton,* 146 U.S. 258 (1892); *Sioux City Street Ry. Co.* v. *Sioux City,* 138 U.S. 98 (1891). These authorities leave no doubt that the Legislature of Texas can require a utility accepting the privilege of laying a pipeline across a State highway, as an incident of exercising the privilege, to assume the additional burden of casing its pipeline in right-of-way acquired for widening the highway.

Review of the Texas statutes granting to utilities the privilege to lay and maintain facilities cross public highways demonstrates that the Legislature, in granting the privilege, imposed the burden (which is accepted by exercise of the privilege) on utilities to adjust their facilities in the original highways and right-of-way acquired for widening. Study will also show that the Legislature had delegated to the Texas Highway Department the exclusive power to control and regulate State highways, and that such power has been granted with the attendant duty of exercising the constitutional control over privileges to use highways.

The Legislature has generously granted railroads and utilities the privilege to lay and maintain their facilities across public highways. Vernon's Ann. Civ. Stat. Articles 6320, 6327, 1436, 1436a, 1436b, 1497, and 6020. In recognition of the constitutional reservation of continued control of privileges, these statutes impose the burden upon a utility accepting the privilege to adjust its lines, in or outside of the original bounds of a highway or stream, to conform to public improvements. After granting the privilege to cross public highways and streams, the pipeline statutes provide:

". . . pipes may be placed under the ground, *as the exigencies of the case may require.*" Article 1436.

". . . *the Highway Commission . . . may require any such . . . corporation . . . at its own expense to relocate its pipes,* mains, . . . for conducting gas on a state highway . . . *so as to permit the widening or changing of traffic lanes,* by giving thirty (30) days written notice to such . . . corporation . . . and specifying the facility or facilities to be moved and indicating the place *on the new right-of-way* where such facility or facilities may be placed. * * * Such . . . corporation shall replace the grade and surface of such road or highway at its own expense." Article 1436b.

"said pipes and pipelines shall be so buried and covered *as not to interfere with the use and occupancy of such road, highway, street or alley by the public . . .*". Article 1497.

"the right to run pipelines . . . across or over any public road or highway can only be exercised *upon condition that the traffic thereon be not interfered with, and that such road or highway be promptly restored to its former condition of usefulness,* and the restoration thereof to be subject also to the supervision of the Commissioners' Court or other proper local authority." Article 6021.

Although it is arguable that the express language of these statutes does not spell out clearly that a utility exercising the privilege of crossing a highway has the burden to adjust its lines for subsequent improvement or widening, the judicial construction of similar language in the railroad statutes removes the argument.

The statutes, Vernon's Ann. Civ. Stat., Articles 6320 and 6327, granting the privilege to railroads to cross public highways and streams, require a railroad to restore the stream or highway "to its former state, or to such

state as not to unnecessarily impair its usefulness", and keep its roadbed across any highway "in a proper condition for the use of the travelling public."

The similarity of language in the railroad and pipeline statutes is obvious. Again, it may be questioned that the language of the railroad statutes expressly require a railroad to adjust facilities outside of the original bounds of a highway or stream to conform to the improvement or widening thereof, but "informed local courts" have found "meaning not discernable to the outsider". *Louisiana Power & Light Co.* v. *City of Thibodeux*, 360 U.S. 25 (1959). The informed Texas Supreme Court has found that the quoted language requires railroads to construct their lines across public highways and streams in the first instance in accordance with State requirements, and, if they desire to continue to exercise the privilege, to make such changes in their lines, in or outside of the bounds of the original highway or stream, as the State may require in improving or widening the public way. *Chicago R. I. & G. RR. Co.* v. *Tarrant County Water Control & Improvement District*, 73 S.W. 2d 55 (Tex. Sup. 1934); *Missouri K & T R. Co.* v. *Rockwall County Levee Improvement District*, 297 S.W. 206 (Tex. Sup. 1927); *Gulf C & S.F. Ry. Co.* v. *Milam County*, 38 S.W. 747 (Tex. Sup. 1897).

Respondent does not cite these decisions for the proposition that the scope of the police power of a state dealing with railroads and pipelines is the same, but cites them to show the meaning given to the language of the railroad statutes, which is practically identical with that of the pipeline statutes. Since the railroads entered Texas before other privileged corporations, the statutory privilege of railroads to cross public highways and streams, with its attendant burdens, was first granted and construed. The similar language of the pipeline statutes has not been construed, but since the cases construing the railroad statutes were decided long prior to the enactment of the gas statutes,

their judicial construction "must be read into the analogous pipeline statutes". *Lone Star Gas Company* v. *State,* 153 S.W. 2d 681 (Tex. Sup. 1941); *Humble Pipe Line Co.* v. *State,* 2 S.W. 2d 1018 (Tex. Civ. App. 1928, error ref.).

The controlling point is the meaning of the pipeline statutes, and the Texas Supreme Court reads the judicial construction of the railroad statutes that the privileges granted are subject to the continuing duty of the railroad to adjust its lines for widening or improving a highway or stream "into the analogous pipeline statutes". No other construction can be given to the pipeline statutes. The mandate of the Constitution must be read into every statutory grant of privilege. The very existence of the constitutional mandate requires the judiciary to construe pipeline statutes to mean that such companies have a continuing duty to adjust their lines, in or outside of the original bounds of the highway, to conform to improvement or widening of the highway.

Under the express language of the pipeline statutes, as judicially construed, the privilege of using the highways imposes, as a condition of the grant, the duty on Petitioner to make such adjustments as the State might thereafter require in improving or widening the highway. Although Petitioner had no obligation to accept the privilege, when it exercised the privilege, it did so subject to the condition that it would comply with the requirement of the State for improving or widening the highway. Under statutes, when the Highway Department requested adjustment, Petitioner had a legal duty to encase its pipelines in the widened areas and performance of this legal duty is not a sufficient consideration to support the alleged promise of Respondent.

Irrespective of the pipeline statutes, however, the Texas Highway Department had the power and duty to require the questioned encasement. The Legislature has delegated

its plenary control of state highways to the Department, Vernon's Ann. Stats., Articles 6663, 6673, 6665, 6667, 6666, 6674q-4. The foregoing statutes, read in light of the Texas Constitution, evidence a complete delegation of the power of the State to control state highways, with its *attendant duty* of exercising continued control over privileges and franchises to use highways. Under this delegated power and duty the Highway Department required that all gas pipelines be cased from right-of-way line to right-of-way line (R. 186), and after Petitioner's acceptance of a permit under this regulation, requested the adjustment in the widened area. *Such request was an exercise of the constitutionally reserved power.*

The conclusion is manifest that by virtue of the general delegation by the Legislature to the Highway Department of exclusive control of the State highways, with the accompanying constitutional reserved power, the State Highway Department was not only authorized but compelled to require Petitioner to encase its lines in the widened areas. Petitioner owed a legal duty to comply with the request, and performance of this legal duty was not a sufficient consideration for any alleged promise of Respondent to pay for its cost.

C. Petitioner's Encasement Was The Performance Of A Legal Duty In Response To The Exercise Of The Police Power Of The State Of Texas.

The undisputed evidence shows and the District Court found that an unencased gas pipeline constitutes a definite hazard to vehicular traffic, the highway and the pipeline. (R. 28, 69, 70, 97, 115 and 116). The danger of explosion, with its consequent injury to persons, property and the highway, was the basis of the Texas Highway Department requiring encasement and requesting Petitioner to make

the additional encasement. Petitioner submits that this is a proper basis for invoking the police power, and that independently of the constitutional reserved power, Petitioner owed a legal duty to comply with the requirement of the Highway Department.

Upon a record that failed "to disclose that appellant's lines were the cause of serious danger to the public", *Panhandle Eastern Pipeline Company* v. *State Highway Commission,* 294 U.S. 613 (1935), declared that, in exercising the police power, pipelines are not upon the same footing as railroads. This case is not controlling because the record here does show that Petitioner's gas pipelines constitute a definite hazard and serious danger to the public.

Panhandle Eastern, decided in 1934, has never been cited by this Court, and the change of conditions since then may well be the reason for its lack of citation. Compared to today, the automobile industry was in its infancy in 1934, and while no question of public safety may have been apparent to the court then, with the present traffic and loads of vehicular traffic on modern highways, the requirement of encasement is necessary to protect the public. The change of conditions during the period certainly requires a new look as to the scope of police power in regulating gas pipelines.

Respondent submits that Petitioner owed a legal duty to submit to the police power of the State, and that the performance of a legal duty is not a sufficient consideration to support a contract with Respondent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM ROBERT SMITH
1508 Tower Life Building
San Antonio 5, Texas
Counsel for Respondent

Of Counsel:

SEARS AND BURNS
ROBERT L. BURNS
1811 C & I Life Building
Houston 2, Texas

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing Brief in Opposition has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil M. Cook, 1100 Esperson Building, Houston 2, Texas, counsel for Petitioner, in person, this 21st day of June, 1963.

.....

William Robert Smith
Counsel for Respondent

Statutes

Vernon's Ann. Civ. Stats., Article 1436 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 427, Art. 1436)

> Such corporation shall have the right and power to enter upon, condemn and appropriate lands, right of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet; or pipes may be placed under the ground, as the exigencies of the case may require.

Vernon's Ann. Civ. Stats., Article 1497 (Revised Civil Statutes of Texas of 1925, Vol. I, p. 440, Art. 1497)

> Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right of way, easements and property of any person or corporation. Such corporation shall have the right to lay its pipes and pipe lines across and under any public road or highway, or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. No pipe lines shall be laid parallel with and on any public highway, closer than fifteen feet from the improved section thereof, except with the approval and under the direction of the commissioners' court of the county in which such highway is located. Said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road,

highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof. Such pipes or pipe lines shall not pass through or under any cemetery, church or college, school house, residence, business, or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof. All such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owners of such land. When such pipes and pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as herein provided for cultivated lands, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof.

Vernon's Ann. Civ. Stats., Article 1436b (Texas Acts 1951, 52nd. Leg., Ch. 470, p. 829)

Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body. Any such person, firm or corporation or incorporated city or town shall notify the State Highway Commission or the Commissioners Court having jurisdiction, as the case may be, when

it proposes to lay any such pipes, mains, conductors and other fixtures for conducting gas within the right-of-way of any state highway or county road outside the limits of an incorporated city or incorporated town, whereupon the Highway Commission or the Commissioners Court, if it so desires, may designate the place upon the right-of-way where the same shall be laid. The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense.

Sec. 2. If after the effective date of this Act an unincorporated area becomes incorporated, any person, firm or corporation or incorporated city or town which, at the date of such incorporation, has pipes, mains, conductors or other facilities within such area so incorporated, may continue to exercise the rights conferred by Section 1 hereof for ten (10) years after the date of such incorporation without consent but subject to the direction of the governing body.

Sec. 3. [General repealer.]

Sec. 4. If any section, sentence, phrase, clause or any part of any section, sentence, phrase or clause of this Act shall for any reason be held invalid, such decision shall not affect the remaining portions of this

Act; and it is hereby declared to be the intention of this Legislature to have passed each section, sentence, phrase, clause, or part thereof, irrespective of the fact that any other section, sentence, phrase or clause or part thereof may be declared invalid.

Vernon's Ann. Civ. Stats., Article 6021 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1720, Art. 6021)

The right to run pipe lines, telegraph and telephone lines along, across or over any public road or highway can only be exercised upon condition that the traffic thereon be not interfered with, and that such road, or highway be promptly restored to its former condition of usefulness, and the restoration thereof to be subject also to the supervision of the commissioners court or other proper local authority. In the exercise of the privileges herein conferred, such pipe lines shall compensate the county or road district, respectively, for any damage done to such public road. Nothing herein shall be construed to grant any pipe line company the right to use any public street or alley of any incorporated city or town, except by express permission from the governing body thereof.

Vernon's Ann. Civ. Stats., Article 6320 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1798, Art. 6320)

Such corporation shall have the right to construct its road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike, or canal when the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike, or canal thus intersected or touched, to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair.

Vernon's Ann. Civ. Stats., Article 6327 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1799, Art. 6327)

> Every railroad company in this State shall place and keep that portion of its roadbed and right of way, over or across which any public county road may run, in proper condition for the use of the traveling public, and in case of its failure to do so for thirty days after written notice given to the section boss of the section where such work or repairs are needed by the overseer of such public road, it shall be liable to a penalty of ten dollars for each week such railroad company may fail or neglect to comply with the requirements of this article. Such penalty shall go to the road and bridge fund of the county in which the suit is brought; and the county attorney, upon the making of an affidavit of the facts by any person, shall at once institute against the company violating any provision of this article suit in the proper court to recover such penalty or penalties, and his wilful failure or refusal to do so shall be sufficient cause for his removal from office, unless it is evident that such suit could not have been maintained. The proceedings under this article shall be conducted in the same manner as civil suits. The county attorney attending to such suits shall be entitled to a fee in each case of ten dollars, to be taxed as costs; provided, that when two or more penalties are sought to be recovered in the same suit, but one such fee shall be allowed. Such suits shall be conducted in the name of the county, and if the county be cast in the suit no costs shall be charged against it.

Vernon's Ann. Civ. Stats., Article 6663 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6663)

> The administrative control of the State Highway Department, hereinafter called the Department, shall be vested in the State Highway Commission, hereinafter called the Commission, and the State Highway Engineer. Said Department shall have its office at Austin where all its records shall be kept.

Vernon's Ann. Civ. Stats., Article 6665 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Article 6665)

> The Commission shall hold regular meetings once each month. They shall attend the same and such special or called meetings as they may provide by rule or the chairman may call. They shall formulate plans and policies for the location, construction and maintenance of a comprehensive system of State highways and public roads. They shall biennially submit a report of their work to the Governor and the legislature, with their recommendations and those of the State Highway Engineer. A quarterly statement containing an itemized list of all moneys received and from what source and of all money paid out and for what purpose shall be prepared and filed in the records of the Department and a copy sent to the Governor. These records shall be open to public inspection.

Vernon's Ann. Civ. Stats., Article 6666 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1898, Art. 6666)

> The Commission shall establish and make public proclamation of all rules and regulations for the conduct of the work of the Department as may be deemed necessary, not inconsistent with the provisions of law. They shall maintain a record of all proceedings and official orders and keep on file copies of all road plans, specifications and estimates prepared by the Department or under its direction.

Vernon's Ann. Civ. Stats., Article 6667 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1899, Art. 6667)

> The Department shall collect information and compile statistics relative to the mileage, character and condition of the public roads in the different counties, and the cost of construction of the different classes of roads in the various counties. It shall investigate and

determine the methods of road construction best adapted to the different sections of the State, and shall establish standards for the construction and maintenance of highways, bridges and ferries, giving due regard to all natural conditions and to the character and adaptability of road building material in the different counties. The Department may, at all reasonable times, be consulted by county and city officials for any information or assistance it can render with reference to the highways within such counties or cities, and it shall supply such information when called for by city or county officials; and it may in turn call upon all such officials for any information necessary for the performance of its duties hereunder. Upon request of the commissioners court of any county, the Department shall consider and advise concerning general plans and specifications for all road construction to be undertaken from the proceeds of the sale of bonds or other legal obligations issued by a county, or by any subdivision or defined district of a county; and such information and advice shall be so obtained before any of the proceeds from such bond issues are expended by or under the direction of the commissioners court.

Vernon's Ann. Civ. Stats., Article 6674a (Texas Acts 1925, 39th Leg., Ch. 186, p. 456, Sec. 1)

The term "highway" as used in this Act shall include any public road or thoroughfare or section thereof and any bridge, culvert or other necessary structure appertaining thereto. The term "improvement" shall include construction, reconstruction or maintenance, or partial construction, reconstruction or maintenance and the making of all necessary plans and surveys preliminary thereto. The term "Commission" refers to the State Highway Commission and the term "Department" refers to the State Highway Department.

PRECEDENTIAL VALUE OF OPINIONS OF TEXAS COURTS OF CIVIL APPEALS

Review by the Texas Supreme Court of a judgment of a Court of Civil Appeals is not a matter or right.

Vernon's Ann. Tex. Rules of Civ. Proc. Rule 467 (Vol. 3, p. 394), provides:

> "The Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

Vernon's Ann. Tex. Rules of Civ. Proc., Rule 483 (Vol. 3, p. 440), provides in part:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

Under this rule, refusal of the application with the docket notation "Refused" adopts the opinion of the Court of Civil Appeals. *Thompson* v. *Gibbs*, 240 S.W. 2d 287 (Tex. Sup. 1951); *State* v. *Larimore*, 295 S.W. 2d 654 (Tex. Sup. 1956). Entry of this docket notation gives the opinion "the same precedential value as one of the Supreme Court's

own opinions". Calvert, *The Application for Writ of Error,* 3 Franki, Texas Rules of Civil Procedure 404, 410 (1955).

Entry of the notation, "Refused. No reversible error", means, and only means, that the application for writ of error "presents no error which requires reversal" of the judgment. Entry of this notation does not mean that the Supreme Court approves any holding stated in the opinion of the Court of Civil Appeals, and does not even mean that the Supreme Court approves the judgment entered by that court. Calvert, *The Application for Writ of Error,* 3 Franki, Texas Rules of Civil Procedure 404 (1955); Simpson and Wall, *Problems of Precedent Affecting Courts of Civil Appeals' Opinions,* 4 S.W.L.J. 398 (1950); Simpson, *Notations on Application for Writ of Error,* 12 Texas Bar Journal 547 (1949).

As stated by Chief Justice Calvert, the present Chief Justice,

> "Cases decided by the Courts of Civil Appeals in which the writ of error was . . . 'Refused, no reversible error' *are but persuasive only, with little precedential value.*"
>
> • • •
>
> The notation 'Refused. No reversible error' is applied automatically if the opinion of the Court of Civil Appeals has dealt with questions . . . *which are not brought forward by points of error for review by the Supreme Court . . .*".

In the suggested instance, entry of the notation does not approve the judgment. In *Gillette* v. *Achterberg,* 325 S.W. 2d 384 (Tex. Sup. 1959), the Court of Civil Appeals, upon two separate and independent grounds, reversed and remanded a judgment granting petitioner's motion for sum-

mary judgment, and the petitioner's application attacked only one of these grounds. Noting that the decision below rested "upon two separate and independent grounds, either of which, if correctly decided or immune to review, will support the judgment of reversal and remand", the Texas Supreme Court held:

> "Since the first question is not raised in the application for writ of error, however, we would be required to affirm the judgment of the Court of Civil Appeals even if the application were granted and every point of error therein sustained. City of Deer Park v. State, 154 Tex. 174, 275 S.W. 2d 77. The application for writ of error is accordingly refused, no reversible error."

By entry of the notation "Refused. No reversible error" in *Gillette*, the Supreme Court did not even approve the judgment. Similarly, when an opinion of a Court of Civil Appeals discusses only one of several points presented by the petitioner and petitioner's application for writ of error attacks only the point discussed, entry of the notation does not even approve the judgment.

To his observation that opinions of the Court of Civil Appeals have "little precedential value", Chief Justice Calvert might well have added that their precedential value, whether little or none, can only be determined by inspection of the briefs in the Court of Civil Appeals and the application for writ of error. Following rendition of the opinion in *City of Abilene* v. *Bailey*, 345 S.W. 2d 540 (Tex. Civ. App. 1961, error ref. n.r.e.), the petitioner did not assign as error, in either its motion for rehearing in the intermediate court or application for writ of error to the Supreme Court, the holding that certain action constituted a taking or damaging of property. The Supreme Court entered the notation, "Refused. No reversible error". In *City of Abilene*

v. *Downs*, 367 S.W. 2d 153 (Tex. Sup. 1963), the Supreme Court points out that the petitioner there understandably interpreted the refusal of the application to indicate approval of the holding, but that it did not because the point "was not properly preserved for review".

The lack of precedential value is demonstrated by the holdings of the Courts of civil Appeals that the holding of one is not stare decisis or binding upon another.

In *Calvary Temple* v. *Taylor*, 288 S.W. 2d 868 (Tex. Civ. App. 1956), the court rejected an opinion of a sister court, holding:

> "Furthermore, being the decision of a court of civil appeals, the doctrine of stare decisis is in no event applicable. In its application to this present litigation, we consider the quoted statement from the court's opinion to have persuasive value only."

In *General American Life Ins. Co.* v. *Rios*, 154 S.W. 2d 191 (Tex. Civ. App. 1941, reversed on other grounds 164 S.W. 2d 521), the court rejected an opinion of another Court of Civil Appeals construing identical provisions of an insurance policy in issue, saying:

> "Despite our high regard for that Court and the ability of the Judge writing the opinion for the Court, we believe the question involved deserves a careful re-examination. If after such careful re-examination our views do not coincide with those expressed in that opinion it is our duty to clearly announce our disagreement therewith."

Malone v. *United States Fidelity & Guaranty Co.*, 9 S.W. 2d 461 (Tex. Civ. App. 1928), observed that another Court of Civil Appeals had rendered two decisions on the point in issue. On one, application for writ of error had been

granted by the Supreme Court and then dismissed by agreement and, on the other, no application was filed. The court disregarded these decisions, holding:

> "This being the status of the two decisions by the Fort Worth court, we think that we should, before following the decisions in those cases, notwithstanding the high standing of that court, be satisfied with the reasoning of those decisions and with the grounds upon which they are based. We are not satisfied that an election of remedies had occurred in those cases, as laid down in the opinions in same."

Similarly, in *Miller* v. *Branch*, 233 S.W. 1032 (Tex. Civ. App. 1921), the court, in response to the appellee's reliance on an opinion of another Court of Civil Appeals as being in conflict with an opinion of that court, held:

> "But, if in any view, it must be said that a conflict exists between the two decisions in relation to the constitutionality of the law, believing, as we do, the decision in the Rumbo case to be well founded and entirely correct, we could not abandon it to adopt the contrary opinion of a court of equal dignity and jurisdiction, notwithstanding the very great respect we entertain for the decisions of that able tribunal."